

to adopt Teleport's proposal that "the Commission should as a matter of policy routinely require continuation of service during a Section 208 complaint[.]"<sup>596</sup> In cases in which an interconnector has filed a complaint with the Commission, we will consider on a case-by-case basis whether to grant injunctive relief requiring the LEC to continue service during the complaint's pendency. As a general matter, however, we believe that the notice procedures outlined below are sufficient to protect the interconnectors from unnecessary and premature termination.

## 6. Catastrophic Loss

### a. Background

368. Of the six LECs currently offering interstate physical collocation under tariffs subject to this investigation, only Lincoln and NYNEX include provisions governing catastrophic loss in their expanded interconnection tariff. When damage to the central office can be repaired, these carriers state that they will repair the damage as quickly as possible, and that fees charged to the interconnector will be apportioned according to the amount of usable floor space until the repair is completed.<sup>597</sup> In the event the central office is damaged extensively and must be abandoned, NYNEX's tariff states that the LEC may terminate the interconnection arrangement on 90 days' notice; Lincoln will terminate the interconnection agreement on 60 days' notice.<sup>598</sup> Nevada states that the provisions in its general access tariff governing man-made and natural disasters also apply to its interconnection tariff.<sup>599</sup>

369. In the *Designation Order*, the Bureau asked the LECs with tariffs that specify the time period in which the LECs are willing to inform interconnectors of their plans to rebuild or relocate a central office following a catastrophic loss to justify those time periods.<sup>600</sup> The Bureau also requested that the parties discuss whether the LECs' tariffs should specify the conditions under which a LEC will provide alternative facilities following a catastrophic loss, the amount of time in which LECs must provide alternative facilities in such an event, and whether the LEC or the interconnector should be responsible for the costs of repairs or relocation.<sup>601</sup> Finally, the Bureau asked the parties to comment on whether the

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<sup>596</sup> Teleport Opposition at B-13.

<sup>597</sup> NYNEX Direct Case, Appendix I at 1 (citing NYNEX F.C.C. Tariff No. 1, Section 28.7.5); Lincoln Tariff F.C.C. No. 3, Section 8.2.5 (G).

<sup>598</sup> NYNEX Direct Case, Appendix I at 1 (citing NYNEX Tariff F.C.C. No. 1, Section 28.7.5); Lincoln Tariff F.C.C. No. 3, Section 8.2.5 (G).

<sup>599</sup> Nevada Direct Case at 21-22.

<sup>600</sup> *Designation Order*, 8 FCC Rcd at 6923.

<sup>601</sup> *Id.*

LECs' tariffs should address obligations of interconnectors and LECs when an interconnector is responsible for a catastrophic loss.<sup>602</sup>

b. Discussion

370. We recognize that the LECs' ability to respond to a catastrophic event, one resulting in substantial damage to the central office or physical collocation space, will depend on several factors, including the LECs' resources, the extent of the damage, the geographic location of the central office, and the availability of contractors. We believe it would be a difficult, if not an impossible task, for LECs to address, in their tariffs, all potential contingencies arising from a catastrophic event. We decline, therefore, to require LECs to include tariff provisions that would specify, in the event of a catastrophic loss, the conditions under which they will provide alternative facilities, the amount of time that would be needed to provide alternative facilities, or the party that would be responsible for the costs of repairs or relocation. Nevertheless, we believe that it is reasonable to require LECs to state in their tariffs that in the event of a catastrophic loss, resulting in damages to the central office and the physical collocation space, they will inform interconnectors of their plans to rebuild as soon as is practicable and that they will restore service to interconnectors as soon as practicable. We believe that this requirement will not interfere with the LECs' business decisions and will provide interconnectors with assurance that their service will be restored as quickly as possible.

7. Relocation

a. Background

371. In the *Designation Order*, the Bureau directed the parties to state (1) how much advanced notice they will give interconnectors for relocating an interconnector's space; (2) the conditions under which the LEC will require relocation; and (3) the charges, if any, for relocation.<sup>603</sup>

372. In its tariff, NYNEX reserves the right to relocate an interconnector's nodes if relocation is required as a result of a legal obligation, a taking by eminent domain, the need to install additional facilities, or an emergency.<sup>604</sup> NYNEX will give the interconnector advance notice in all cases, except emergencies, but does not specify the length of advance notice.<sup>605</sup> In an emergency, NYNEX will use "reasonable efforts" to give advance notice.<sup>606</sup>

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<sup>602</sup> *Id.*

<sup>603</sup> *Id.* at 6918.

<sup>604</sup> NYNEX Direct Case, Appendix J at 1-2.

<sup>605</sup> *Id.*

Pacific states that it has not attempted to specify all of the conditions under which it would be necessary to relocate an interconnector, but that such circumstances would include unexpected growth, technological or regulatory changes, "or other developments that are inherently unforeseeable."<sup>607</sup> Pacific also states that it provides 90 days' written notice before relocating customers within the same central office.<sup>608</sup> Nevada states that its tariff does not authorize it to relocate an interconnector but that, if relocation is necessary because of unexpected demand, Nevada will amend its tariff to permit relocation under specified conditions.<sup>609</sup> Rochester states that it does not reserve the right to relocate an interconnector's equipment unilaterally and states that it would expect to resolve such issues through good faith negotiation.<sup>610</sup> SNET provides six months' notice to the customer when its equipment must be relocated.<sup>611</sup> Lincoln's tariff does specify a notice period, but the company states that it will negotiate a schedule with the interconnector. Lincoln's tariff states that "under a 'force majeure' situation, the delayed party shall give immediate notice to the other."<sup>612</sup>

b. Discussion

373. We believe LECs should be permitted to relocate interconnectors to another central office when unusual circumstances make such relocation necessary. For example, LECs may reasonably require interconnectors to relocate when a central office is taken by eminent domain, when a state commission requires a LEC to move its central office, or when an unsafe or hazardous condition makes abandonment of a central office necessary. In such cases, relocation of an interconnector may be necessary because of circumstances beyond the LEC's control. In addition, a LEC may make a reasonable business decision to sell a central office or close a central office because of network engineering considerations. We believe that relocation under these circumstances also would not be unreasonable because an interconnector's presence in a LEC's central offices should not prevent a LEC from making reasonable business decisions regarding the number of central offices or their locations. As we stated in the *Special Access Expanded Interconnection Order*, however, we will not permit LECs to relocate interconnectors to another central office for other reasons, absent extraordinary circumstances.

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<sup>606</sup> *Id.*

<sup>607</sup> Pacific Direct Case at 79.

<sup>608</sup> *Id.*

<sup>609</sup> Nevada Direct Case at 22-23.

<sup>610</sup> Rochester Direct Case at 11.

<sup>611</sup> SNET Direct Case at 17.

<sup>612</sup> Lincoln Direct Case at 22.

374. We require LECs that currently provide interstate physical collocation service under tariffs subject to this investigation to state in their tariffs that, if they reasonably relocate interconnectors to another central office, they will make all reasonable efforts to minimize disruption of the interconnectors' services. In addition, we require that if these LECs relocate interconnectors to either a central office at a new location or to a new location within the central office for reasons other than an emergency, they provide interconnectors with at least 180 days' advance written notice. We find that a shorter period may not provide interconnectors with the time they need to execute an orderly relocation plan that minimizes disruption in service to the interconnectors' customers.

375. Finally, we do not have enough information in the record to determine the circumstances that would justify requiring a LEC to bear the cost of relocating an interconnector. We expect that such cases will occur infrequently and that, if they do occur, the parties will attempt to negotiate all the terms of a relocation. If necessary, we will address this issue at a later time.

## 8. Dark Fiber

376. In the *Designation Order*, the Bureau required Bell Atlantic, BellSouth, SWB, and US West, the only LECs that were required to provide dark fiber service, to state whether their expanded interconnection tariffs prohibit or permit a collocater to cross-connect to LEC-provided dark fiber service in the same way in which an interconnector would cross-connect to LEC-provided DS1 or DS3 service.<sup>613</sup> Because these LECs are not among the six LECs currently providing physical collocation within the context of this investigation, this issue is moot, and we give it no further consideration in this proceeding.

## 9. Channel Assignment

### a. Background

377. In the *Designation Order*, the Bureau directed the LECs to explain the limits they had imposed on the interconnectors' ability to make their own channel assignments.<sup>614</sup> Lincoln, Nevada, Pacific, SNET, and Rochester permit interconnectors to designate the channel facility assignments for their circuits.<sup>615</sup> NYNEX permits interconnectors to designate channel facility assignments in its New York central offices, but it reserves the right to

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<sup>613</sup> *Designation Order*, 8 FCC Rcd at 6918.

<sup>614</sup> *Id.* at 6919.

<sup>615</sup> Lincoln Direct Case at 14; Nevada Direct Case at 15-16; Pacific Direct Case at 64; SNET Direct Case at 14; Rochester Direct Case at 8.

designate channel facility assignments in its New England central offices.<sup>616</sup>

b. Discussion

378. Channel facility assignment refers to the designation of the individual derived channels within a high capacity facility.<sup>617</sup> When the interconnector retains control of the channel facility assignment, it is able to design the network configuration between its customer and the LEC's main distribution frame by designating which channel facilities a LEC must connect to specific channels on the interconnector's own network.<sup>618</sup> Based on the record, it appears that, with the exception of NYNEX's New England offices, all six LECs that currently offer interstate physical collocation subject to this investigation already permit the interconnector to assign the channel facilities on the LEC's side of the network to match the channel facilities on its own network. By contrast, in NYNEX's New England offices, the ordering system is fully automated, and the channel facility assignments are made mechanically at the time the orders are processed.<sup>619</sup> In this situation, the interconnector must wait for NYNEX to provide it with a design layout record that designates which of the channels the LEC will connect to its end user.<sup>620</sup> NYNEX explains that it is currently developing a mechanized solution that will give the interconnector the capability to designate the assignment when it places its order for initial services.<sup>621</sup>

379. We therefore require LECs to permit interconnectors to control channel assignment in a physical collocation arrangement. The record indicates that a process that permits interconnectors to designate channel facility assignments is not overly burdensome for the LEC and is more efficient and less costly for the interconnector. Accordingly, within 180 days from the date this order is released, we order all LECs currently offering physical collocation to develop the capability and to state in their tariffs that they will allow the interconnector to designate the channel facility assignments for non-multiplexed channels.

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<sup>616</sup> NYNEX Direct Case, Appendix E at 1-2.

<sup>617</sup> Letter from J. Manning Lee, Vice President, Regulatory Affairs, Teleport to Paul D'Ari, Common Carrier Bureau, FCC, (dated May 2, 1996).

<sup>618</sup> *Id.*

<sup>619</sup> Letter from Dee May, Director-Federal Regulatory Issues, NYNEX to Paul D'Ari, Common Carrier Bureau, FCC (dated May 16, 1996).

<sup>620</sup> Letter from J. Manning Lee, Vice President, Regulatory Affairs, Teleport to Paul D'Ari, Common Carrier Bureau, FCC, (dated May 2, 1996).

<sup>621</sup> *Id.*

## 10. Letters of Agency

### a. Background

380. In the *Designation Order*, the Bureau directed the parties to discuss the reasonableness of requiring LECs to accept letters of agency (LOA) from interconnectors' customers for ordering and billing of access services.<sup>622</sup> With the exception of SNET and Nevada, all LECs currently offering physical collocation indicate that they either accept, or are willing to accept, LOAs for ordering and billing for expanded interconnection services.<sup>623</sup> Nevada states that its tariff does not authorize or prohibit the use of LOAs, and SNET states that this issue is not applicable to SNET's physical collocation service.<sup>624</sup>

### b. Discussion

381. We require all LECs currently providing interstate physical collocation service under tariffs subject to this investigation to revise their tariffs to state that they will accept LOAs for ordering and billing purposes.<sup>625</sup> We find that the record supports this requirement because it is a widely accepted business practice and all LECs currently providing physical collocation appear to be willing to accept LOAs that authorize interconnectors' customers to order and be billed for expanded interconnection services. Moreover, we find that permitting the use of LOAs will allow interconnectors to compete more efficiently with LECs because LOAs allow interconnectors to lower their costs by eliminating duplicative administrative functions. We also conclude that because most LECs appear to permit the use of LOAs in connection with other special and switched access services, it would be unreasonably discriminatory for LECs to refuse to honor LOAs that authorize interconnectors' customers to order and be billed for expanded interconnection service.

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<sup>622</sup> *Designation Order*, 8 FCC Rcd at 6926.

<sup>623</sup> Lincoln Direct Case at 27; NYNEX Direct Case, Appendix N at 1; Pacific Direct Case at 85; Rochester Direct Case at 14.

<sup>624</sup> Nevada Direct Case at 28; SNET Direct Case at 22.

<sup>625</sup> We note that, in dismissing NYNEX's petition for a waiver of Part 69 of the Commission's rules, the Common Carrier Bureau ruled recently that the Commission's rules do not prohibit LECs from accepting a LOA executed by the interconnector authorizing another party to order and be billed for cross-connection service. NYNEX Telephone Companies, Petition for Waiver of Part 69 of the Commission's Rules, 11 FCC Rcd 13136 (1996). In that order, the Bureau stated that "there is no evidence in the record that the ordering and billing of expanded interconnection service differs in any material respect from the ordering and billing of other access services for which LOAs are accepted. *Id.*

## 11. Billing from State/Interstate Tariffs

### a. Background

382. In the *Designation Order*, the Bureau directed LECs to discuss the reasonableness of using the ten percent rule to determine if interstate or intrastate tariffs should apply, and, specifically, "how the ten percent rule, as used in the LECs special access tariffs, should apply to the rate elements in the collocation tariffs."<sup>626</sup> LECs that opposed using the ten percent rule were directed to explain why the alternative they prefer is more reasonable.<sup>627</sup> The Bureau also directed the parties to discuss these issues as applied to switched access charges.<sup>628</sup>

383. Lincoln, Nevada, Pacific, and SNET state that they do not tariff intrastate expanded interconnection.<sup>629</sup> Rochester states that interconnectors using Rochester's expanded interconnection services will do so for the purpose of providing special access service and, because the rule applies to special access service, "there is no reason the 10 percent rule should not apply."<sup>630</sup> NYNEX's tariff states that nonrecurring and recurring charges for expanded interconnection will be apportioned based on the percent interstate use (PIU) of all services provided to the customer's node; the PIU must be supplied by the customer.<sup>631</sup>

### b. Discussion

384. The "ten percent rule," which was adopted by the Commission in 1989 on recommendation of the Joint Board, requires LECs to assign 100 percent of the costs of a special access line to the interstate jurisdiction if more than 10 percent of the traffic on the line is interstate.<sup>632</sup> The Commission adopted this rule because of the difficulties in

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<sup>626</sup> *Designation Order*, 8 FCC Rcd at 6925.

<sup>627</sup> *Id.*

<sup>628</sup> *Id.* On February 14, 1994, the Bureau suspended the switched access tariffs filed by the LECs and initiated an investigation. *Switched Transport Physical Collocation Tariff Suspension Order*, 9 FCC Rcd 817. On September 13, 1995, the Bureau concluded that the issues in the switched access investigation were the same as the issues in the pending special access investigation, and consequently consolidated the two investigations. *Switched Transport Consolidation Order*, 10 FCC Rcd 12,227. The Bureau directed parties to submit comments if they disagreed with this conclusion, but no comments were filed. *Id.*

<sup>629</sup> Lincoln Direct Case at 26; Nevada Direct Case at 28; Pacific Direct Case at 85; SNET Direct Case at 21.

<sup>630</sup> Rochester Direct Case at 13.

<sup>631</sup> NYNEX Direct Case, Appendix M at 1.

<sup>632</sup> MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, Decision and Order, 4 FCC Rcd 5660 (1989).

determining the jurisdiction of traffic on special access lines, which are not connected to a LEC switch at which traffic can be measured. The Commission adopted this non-usage based separation method for special access lines to avoid administrative problems associated with determining jurisdictional separations on a usage basis. The ten percent rule, however, does not apply to traffic on the switched network because the LECs can determine the jurisdiction of switched traffic through measurements at their switches. Using the data captured by its switch, a LEC can allocate costs to interstate traffic based on the percentage of interstate usage (PIU).

385. LECs provide both special access and switched transport expanded interconnection through physical collocation. The record indicates that NYNEX apportions the nonrecurring charges for the initial construction of the multiplexing node and the recurring charges for space and power based on PIU.<sup>633</sup> The PIU NYNEX uses is based on the proportions of intrastate and interstate entrance facilities, in voice grade equivalents, that are connected to the multiplexing node.<sup>634</sup> In the case of special access services, the jurisdiction of each entrance facility is determined by the customer when it orders the facility.<sup>635</sup> In the case of switched access services, the entrance facilities are apportioned between intrastate and interstate jurisdictions, in voice grade equivalents, based on the percentage of usage that is intrastate or interstate over those facilities, as measured by NYNEX or as reported by the interconnector. The combination of switched and special access voice grade equivalents, by jurisdiction, determines the total PIU for the multiplexing node.<sup>636</sup>

386. Based on the record before us, we cannot conclude that the tariff provisions at issue in this investigation that use either the ten percent rule or PIU are unreasonable for interstate ratemaking purposes. Although it appears that NYNEX's approach is a feasible method for determining interstate and intrastate usage of a physical collocation arrangement, we are unable to conclude, on this record, that it is appropriate to prescribe this approach for all LECs.

## 12. Payment of Taxes

### a. Background

387. In the *Designation Order*, the Bureau requested that any LEC with tariff provisions requiring that interconnectors pay all taxes to explain why it is reasonable to

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<sup>633</sup> Letter from Dee May, Director - Federal Regulatory Issues, NYNEX to Paul D'Ari, Competitive Pricing Division, FCC (dated June 5, 1996).

<sup>634</sup> *Id.*

<sup>635</sup> *Id.*

<sup>636</sup> *Id.*

include such a requirement in a physical collocation tariff.<sup>637</sup> Lincoln's tariff requires interconnectors to pay all such taxes promptly, and to provide Lincoln with appropriate documentation that they have paid these taxes.<sup>638</sup>

b. Discussion

388. We find that it is unreasonable for a LEC to require interconnectors to demonstrate to the LEC that they have paid their taxes. Whether interconnectors pay their taxes promptly would have no impact on the service LECs provide interconnectors and is therefore of no concern to any LEC. Accordingly, we order Lincoln and any other LEC subject to this investigation with similar provisions to delete such language from their tariffs.

F. Compliance Filings

1. Rate Structure, Direct Costs, and Overhead Loadings

a. Introduction

389. As discussed in Sections III.B and III.C, we find that certain rate structures and certain direct costs contained in the physical collocation tariffs of Ameritech, Bell Atlantic, BellSouth, Central, CBT, GTOC, Lincoln, Nevada, NYNEX, Pacific, Rochester, SNET, SWB, and US West are unlawful. We also find, as discussed in Section III.D, that the overhead loadings contained in the physical collocation tariffs of Ameritech, Bell Atlantic, BellSouth, Central, GTOC, Lincoln, Nevada, NYNEX, Pacific, Rochester, and US West are unlawful. We will determine the lawfulness of the overhead loadings contained in the physical collocation tariffs of CBT and SWB when we resolve the requests by these companies for confidential treatment of the overhead loading and direct cost data they submitted for their comparable DS1 and DS3 services.

390. We order those LECs that still have in effect physical collocation tariffs that were designated for investigation in CC Docket No. 93-162 -- Lincoln, Nevada, NYNEX, Pacific, Rochester, and SNET -- to submit tariff revisions and plans for issuing refunds, as described below. Moreover, we order Ameritech, Bell Atlantic, BellSouth, Central, CBT, GTOC, SWB, and US West, the LECs that phased out physical collocation service following the *Virtual Collocation Order*,<sup>639</sup> to submit plans for issuing refunds, as described below.<sup>640</sup>

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<sup>637</sup> *Designation Order*, 8 FCC Rcd at 6927.

<sup>638</sup> Lincoln Direct Case at 29.

<sup>639</sup> For a discussion of the LECs' response to the mandatory virtual collocation policy in the *Virtual Collocation Order*, see Section II.A *supra*.

b. LECs That Still Have in Effect Physical Collocation Tariffs That Were Designated for Investigation in CC Docket No. 93-162

391. We order Lincoln, Nevada, NYNEX, Pacific, Rochester, and SNET to revise their tariffs to establish their rates in accordance with Sections III.B, III.C, III.D, and Appendix C of this Order. These companies must submit tariff revisions establishing new rates, with full explanations of how they have complied with the findings in this Order, no later than 45 days from the release date of this Order. In particular, these LECs must file new TRP charts for each function for which we make a direct cost or an overhead loading disallowance in this Order. These new TRP charts must set forth each LEC's revised investments, direct costs, overhead loading factors, and rates in the format the Bureau required in the *Designation Order*.<sup>641</sup>

392. We further order these companies to refund, with simple interest, the difference between the rates that result from the direct cost or overhead loading disallowances we make in this Order and the actual rates charged to those customers subscribing to physical collocation services of these LECs between December 15, 1994 and the day before each LEC's new physical collocation rates take effect pursuant to this Order. All refunds shall be calculated in accordance with the requirements established in Sections III.A, III.B, III.C, III.D, and Appendix C of this Order. The companies are ordered to submit plans for issuing refunds to the Common Carrier Bureau for review and approval pursuant to our delegation of authority within 45 days of the release of this Order. Interest shall be computed on the basis of interest rates specified by the United States Internal Revenue Service. These LECs' refund plans must contain full explanations of how they have complied with the findings of this Order.

c. LECs That Phased Out Physical Collocation Service Following the *Virtual Collocation Order*

393. We order Ameritech, Bell Atlantic, BellSouth, Central, GTOC, and US West to refund, with simple interest, the difference between the rates that result from the direct cost or overhead loading disallowances we make in this Order and the actual rates charged to those customers subscribing to physical collocation services of these LECs between December 15, 1994 and the date each LEC discontinued providing physical collocation service. All refunds shall be calculated in accordance with the requirements established in Sections III.A, III.B, III.C, III.D, and Appendix C of this Order. The companies are directed to submit their plans for issuing refunds to the Common Carrier Bureau for review and approval pursuant to our

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<sup>640</sup> Some LECs that discontinued offering physical collocation have filed new tariffs reinstating physical collocation service. Ameritech Tariff F.C.C. No. 2, Transmittal No. 981 (filed July 2, 1996); Bell Atlantic Tariff F.C.C. No. 1, Transmittal No. 883 (filed June 4, 1996). These tariff filings, as well as any other carriers' future filings reinstating physical collocation service, will be evaluated in separate proceedings.

<sup>641</sup> *Designation Order*, 8 FCC Rcd 6909.

delegation of authority within 45 days of the release of this Order. Interest shall be computed on the basis of interest rates specified by the United States Internal Revenue Service. These LECs' refund plans must contain full explanations of how they have complied with the findings of this Order. In particular, these LECs must file new TRP charts for each function for which we make a direct cost or an overhead loading disallowance in this Order. These new TRP charts must set forth each LEC's revised investments, direct costs, overhead loading factors, and rates in the format the Bureau required in the *Designation Order*.<sup>642</sup>

394. We also order CBT and SWB to refund, with simple interest, the difference between the rates that result from the direct cost disallowances we make in this Order and the actual rates charged to those customers subscribing to physical collocation services of these LECs between December 15, 1994 and the date each LEC discontinued providing physical collocation service. All refunds shall be calculated in accordance with the requirements established in Sections III.A, III.B, III.C, and Appendix C of this Order. The companies are directed to submit their plans for issuing refunds to the Common Carrier Bureau for review and approval pursuant to our delegation of authority within 45 days of the release of this Order. Interest shall be computed on the basis of interest rates specified by the United States Internal Revenue Service. These LECs' refund plans must contain full explanations of how they have complied with the findings of this Order. In particular, these LECs must file new TRP charts for each function for which we make a direct cost disallowance in this Order. These new TRP charts must set forth each LEC's revised investments, direct costs, and rates and unrevised overhead loading factors in the format the Bureau required in the *Designation Order*.<sup>643</sup>

395. The investigation and accounting order imposed by the Common Carrier Bureau in CC Docket No. 93-162 for the physical collocation tariffs of CBT and SWB will remain in effect pending resolution of the requests by these companies for confidential treatment of the overhead loading and direct cost data they submitted for their comparable DS1 and DS3 services. If, at the conclusion of this investigation, we determine that the overhead loading factors that CBT and SWB assigned to physical collocation services resulted in rates that are above just and reasonable levels, we will require CBT and SWB to pay additional refunds to customers that purchased physical collocation service from these LECs during the period from December 15, 1994 to the date each LEC discontinued providing physical collocation service.

## 2. Terms and Conditions

396. We also find unlawful certain terms and conditions appearing in the physical collocation tariffs of Lincoln, Nevada, NYNEX, Pacific, Rochester, and SNET. We address only the terms and conditions for physical collocation service offered by these LECs because

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<sup>642</sup> *Id.*

<sup>643</sup> *Id.*

retroactive application of modified terms and conditions can have no practical effect upon LECs that no longer provide interstate physical collocation service under the tariffs subject to this investigation. We order Lincoln, Nevada, NYNEX, Pacific, Rochester, and SNET to file tariff revisions reflecting our findings in this investigation, as specified in Section III.E of this Order, no later than 45 days from the release date of this Order.

#### **IV. BELLSOUTH'S PETITION FOR RECONSIDERATION OF THE *INTERIM OVERHEAD ORDER***

##### **A. Background**

397. On June 9, 1993, the Bureau released the *Physical Collocation Tariff Suspension Order* to address several petitioners' concerns that certain LECs were using an overhead costing methodology to price their interconnection service in an anticompetitive manner.<sup>644</sup> The Bureau determined that LECs had failed to justify their overhead loadings because they did not provide adequate data on comparable service offerings. The Bureau partially suspended the LECs' expanded interconnection rates because they included, without adequate explanation, overhead loadings that exceeded overhead loadings the Bureau derived from ARMIS data for special access services. In addition, the Bureau adjusted the overhead loadings to eliminate double-counting of overhead costs.<sup>645</sup>

398. In the *Designation Order*, released on July 23, 1993, the Bureau directed the LECs to file the overhead loading factors they had used to develop each expanded interconnection rate element, to explain the basis for these factors, and to demonstrate how the factors were derived.<sup>646</sup> On November 12, 1993, we released the *Interim Overhead Order*, which stated that the LECs had still not presented persuasive overhead cost showings with sufficient detail and explanation to justify their proposed overhead loading factors, although they had ample opportunity to do so.<sup>647</sup> Accordingly, we found the LECs' rates for expanded interconnection service unlawful, and pursuant to authority under Sections 154(i), 201 and 205 of the Communications Act, 47 U.S.C. §§ 154(i), 201, 205, we prescribed the maximum permissible overhead loading factors to be used in calculating interim rates for expanded interconnection services pending further investigation.<sup>648</sup>

399. In prescribing the maximum permissible overhead loading factors for expanded

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<sup>644</sup> *Physical Collocation Tariff Suspension Order*, 8 FCC Rcd 4589.

<sup>645</sup> *Id.* at 4596-4598.

<sup>646</sup> *Designation Order*, 8 FCC Rcd at 6913.

<sup>647</sup> *Interim Overhead Order*, 8 FCC Rcd at 8356.

<sup>648</sup> *Id.*

interconnection rates for the interim period, we concluded that the ARMIS-based overhead levels used in the *Physical Collocation Tariff Suspension Order* continued to represent the best currently available, verifiable, and reasonable surrogate for the upper limits on overhead loading factors.<sup>649</sup> We emphasized, however, that we were not finding that ARMIS-FDC overhead levels were the only verifiable and reasonable upper limits for overhead loading levels for expanded interconnection service, or much less the ideal upper limits for overhead loading levels for this service. We stated that we would continue to examine this issue and that our interim prescription was subject to a two-way adjustment mechanism to protect both interconnectors and LECs if further investigation revealed that refunds or supplemental payments would be warranted at the conclusion of the physical collocation tariff investigation.<sup>650</sup>

## B. Pleadings

400. On December 13, 1993, BellSouth filed a petition for reconsideration of the *Interim Overhead Order* in which it contends that the Commission's interim rate prescription was an unlawful exercise of its authority.<sup>651</sup> According to BellSouth, Section 4(i) provided no basis for the interim prescription because the interim prescription was inconsistent with the requirements of Sections 204 and 205 of the Act.<sup>652</sup> Specifically, BellSouth claims that because the Commission failed to make a determination that BellSouth's rates were "unjust and unreasonable" as required under Section 204(a) of the Act, it was obligated to permit its tariffs to go into affect after a five month suspension period.<sup>653</sup> Additionally, BellSouth claims that the Commission did not provide for a full hearing or prescribe "just and reasonable" rates as required by Section 205.<sup>654</sup> According to BellSouth, a prescribed rate under Section 205 must be determined to be just and reasonable. BellSouth argues that when the Commission determines a rate to be just and reasonable, it cannot subsequently find that same rate to be unjust and unreasonable by implementing, at some future date, a two-way adjustment mechanism.<sup>655</sup> BellSouth further argues that the Commission's reliance on *Lincoln Telephone Telegraph v. FCC* ("*Lincoln Telephone*") is misplaced because unlike this case,

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<sup>649</sup> *Id.* at 8360.

<sup>650</sup> *Id.* at 8362.

<sup>651</sup> BellSouth Petition for Reconsideration (filed Dec. 13, 1993).

<sup>652</sup> *Id.* at 8-11.

<sup>653</sup> *Id.* at 3-4.

<sup>654</sup> *Id.* at 8-10.

<sup>655</sup> *Id.* at 9-10.

*Lincoln Telephone* did not involve carrier-initiated rates and a Section 204 proceeding.<sup>656</sup>

401. On February 4, 1994, Ameritech filed comments in support of BellSouth's petition. Ameritech contends that the Commission's attempt to prescribe rates, while at the same time allowing refunds, improperly blends its authority to order refunds under Section 204 with its authority to prescribe rates prospectively under Section 205 of the Act.<sup>657</sup> Ameritech contends that the Commission must either act under Section 204(a) and allow the filed rates to become effective subject to a suspension and accounting order, or prescribe just and reasonable rates under Section 205.<sup>658</sup>

402. MFS, Ad Hoc Telecommunications Users Group (Ad Hoc), and ALTS<sup>659</sup> filed comments in opposition to BellSouth's petition for reconsideration in which they argue that the interim prescription was a proper exercise of the Commission's authority under Section 4(i) and Section 205 of the Act.<sup>660</sup> ALTS argues that Section 205 grants the Commission substantial latitude in structuring a rate prescription, that when it imposed a maximum overhead rate level based on ARMIS FDC cost overhead levels, the Commission was well within the authority granted it by that section, and that the Commission's inability to prescribe a final rate does not undermine the validity of its conclusion that the proposed rates were unlawful.<sup>661</sup> ALTS, Ad Hoc, and MFS maintain that *Lincoln Telephone* supports the Commission's authority to prescribe an interim rate.<sup>662</sup> ALTS and MFS further contend that the result BellSouth is seeking is inconsistent with the Commission's goals for expanded interconnection and the public interest because the carrier seeks to have the Commission either allow unlawful tariffs to go into effect or reject the tariffs, and deny the interconnectors and their customers the benefit of expanded interconnection.<sup>663</sup> ALTS asserts that BellSouth's interpretation of the Act would effectively permit a LEC to refuse to submit sufficient evidence to enable the Commission to make a determination about the reasonableness of the LECs' rates and then require that those rates become effective because a determination about

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<sup>656</sup> *Id.* at 12 (citing *Lincoln Telephone and Telegraph v. FCC*, 659 F.2d 1092 (D.C. Cir. 1981)).

<sup>657</sup> Ameritech Reply at 3.

<sup>658</sup> *Id.* at 4.

<sup>659</sup> Ad Hoc Opposition (filed Feb. 4, 1994); MFS Opposition (filed Feb. 4, 1994). ALTS filed its comments on February 7, 1994, with a motion to accept the late-filed pleading. ALTS Opposition (filed Feb. 7, 1994). We grant ALTS' motion.

<sup>660</sup> ALTS Opposition at 7; MFS Opposition at 2; Ad Hoc Opposition at 6.

<sup>661</sup> ALTS Reply at 4-5, 9.

<sup>662</sup> ALTS Opposition at 11-12; Ad Hoc Opposition at 19; MFS Opposition at 11-12.

<sup>663</sup> ALTS Opposition at 12; MFS Opposition at 7-8.

reasonableness was not possible.<sup>664</sup>

403. In its reply, BellSouth argues that the oppositions of ALTS, MFS, and Ad Hoc are predicated on incorrect factual assumptions or a misapplication of the prevailing law.<sup>665</sup> BellSouth maintains that the *Interim Overhead Order* does not mandate a just and reasonable prescription because the interim prescription is subject to a two-way adjustment mechanism which may require either refunds or retroactive charges.<sup>666</sup> BellSouth contends that in the *Interim Overhead Order*, the Commission improperly blended its authority to order refunds in Section 204(a) with its authority to prescribe rates prospectively under Section 205.<sup>667</sup>

### C. Discussion

404. In the *Interim Overhead Order*, we relied primarily on Section 4(i) of the Telecommunications Act for our authority to prescribe an interim rate. Section 4(i) grants this Commission discretionary authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of its functions."<sup>668</sup> Indeed, our authority to prescribe interim rates as a necessary consequence of our responsibilities under Sections 204 and 205 was affirmed by the United States Court of Appeals for the District of Columbia Circuit in *Lincoln Telephone*, a case that we cited for support of our position in the *Interim Overhead Order*.<sup>669</sup> In *Lincoln Telephone*, the court held that an interim collection billing and collection system subject to later adjustment was a valid exercise of the Commission's authority under Section 4(i), clearly supporting our authority to prescribe interim rates under this section when helpful and necessary to implement our orders.<sup>670</sup> We disagree with BellSouth's assertion that our

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<sup>664</sup> ALTS Opposition at 2.

<sup>665</sup> BellSouth Reply at 2.

<sup>666</sup> *Id.* at 4.

<sup>667</sup> *Id.* at 5.

<sup>668</sup> 47 U.S.C. § 154(i) (1993). See, e.g., Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, Memorandum Opinion and Order, 6 FCC Rcd 4776, 4777 (1991); Western Union Telegraph Co., 1 FCC 829, 835 (1986); Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers, 5 FCC Rcd 197, 201-203 (1989). See also *Lincoln Telephone*, 659 F.2d 1092; *FTC Communications, Inc. v. FCC*, 750 F.2d 226, 232 (2d Cir. 1984).

<sup>669</sup> *Interim Overhead Order*, 8 FCC Rcd at 8362.

<sup>670</sup> "[T]he Commission's establishment of an interim billing and collection arrangement was both a helpful and necessary step for the Commission to take in implementing its 'immediate' interconnection order." 659 F.2d at 1107; see also *FTC Communications v. FCC*, 750 F.2d 226 (2d Cir. 1984) (affirming Commission's authority under Section 4(i) to set interim rates for interconnection between the domestic record carrier, Western Union, and international record carriers, subject to an accounting order, pending the conclusion of a rulemaking to set permanent rates

reliance on *Lincoln Telephone* was misplaced. We find that *Lincoln* clarifies that prescribing an interim rate is a valid exercise of discretionary power given the Commission by Section 4(i) and does not become inconsistent with the Act when it is accompanied by a two-way adjustment mechanism.<sup>671</sup>

405. We reject BellSouth's argument that we lacked sufficient information to make a determination with respect to the justness and reasonableness of BellSouth's rates and that the interim rate prescription was, therefore, inconsistent with the requirements of Section 204(a). Section 204(a) of the Act states that carriers, not this Commission, have the burden of proving that their rates are just and reasonable.<sup>672</sup> In the *Special Access Expanded Interconnection Order*, we required LECs to justify their physical collocation tariffs using the "new services test."<sup>673</sup> Under the new services test, LECs must file detailed cost support to enable the Commission to make a conclusive finding that the rates derived on the basis of such costs are just and reasonable. Cost support under the new services test must include engineering studies, time and wage studies, or other cost accounting studies that identify the costs of providing the new service.<sup>674</sup> Notwithstanding these clear and specific filing requirements, all LECs that filed a physical collocation tariff generally failed to provide adequate support for their overhead loading factors. Partly as a result of the LECs' failure to explain and justify their overhead loading factors, the Bureau suspended and initiated an investigation into the LECs' physical collocation tariffs.<sup>675</sup>

406. LECs that were required to provide physical collocation were given another opportunity to justify their overhead loading factors when they filed their direct cases in response to the Bureau's *Designation Order*.<sup>676</sup> In that order, the Bureau directed the LECs to

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replacing expired, contract-based rates).

<sup>671</sup> See AT&T Exchange Network Facilities for Interstate Access, Order on Reconsideration, 93 FCC 2d 739, 762 (1983).

<sup>672</sup> "At any hearing involving a new or revised charge, or a proposed new or revised charge, the burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier." 47 U.S.C. § 204(a)(1) (1993).

<sup>673</sup> Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) ("*Special Access Expanded Interconnection Order*").

<sup>674</sup> Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, and Policy and Rules Concerning Rates for Dominant Carriers, CC Docket 87-313, Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524, 4531 (1991).

<sup>675</sup> *Physical Collocation Tariff Suspension Order*, 8 FCC Rcd 4589.

<sup>676</sup> *Designation Order*, 8 FCC Rcd at 6912.

explain how they developed their overhead loading factors for each rate element of expanded interconnection because, in most cases, the LECs' overhead factors exceeded, without explanation, those calculated by the Bureau in the *Physical Collocation Tariff Suspension Order*.<sup>677</sup> Specifically, the Bureau required the LECs to file the overhead factors they had used to develop each rate element of expanded interconnection service, to explain the basis for these factors, and to demonstrate how they were derived. To the extent that overheads varied among expanded interconnection rate elements, LECs were asked to explain why.<sup>678</sup> In response to the *Designation Order*, all LECs, including BellSouth, filed direct cases that failed to include all the information requested by the Bureau. Hence, despite repeated directions from the Bureau that LECs provide cost support and explanations for their overheads, the LECs failed to submit adequate cost justification for their high levels of overhead loadings assigned to physical collocation services.

407. In the *Interim Overhead Order*, we specifically noted that the LECs had failed to meet their burden of proof and therefore concluded that their overhead loading factors were unjust and unreasonable, and therefore unlawful:

In view of the numerous deficiencies in the LECs' direct cases, we find that the LECs have thus far justified neither their overhead loading factors nor their comparisons based on closure factors using prospective costs. Based on the current record, the LECs have failed to meet their burden of proof under Section 204(a) of justifying their proposed overhead loadings for expanded interconnection services. Although our Orders permit LECs to use any reasonable level of overheads, the current levels have not been justified as reasonable. Accordingly, based on the current record, we must find the LECs' originally filed rates for expanded interconnection to be unlawful.<sup>679</sup>

Contrary to BellSouth's argument, therefore, the Commission made a clear finding that the LECs' rates were unjust and unreasonable and therefore unlawful. We found that under Section 204(a), LECs have the burden of proving that their rates are "just and reasonable," and that LECs in this case failed to meet this burden after receiving ample opportunity to do so. Accordingly, we were within our statutory authority to declare their rates unjust and unreasonable.

408. We also reject BellSouth's arguments that we did not offer a full opportunity for hearing and our interim rate was unreasonable because it was subject to a future adjustment. As discussed above, the LECs, including BellSouth, participated in a hearing in

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<sup>677</sup> 8 FCC Rcd 4589.

<sup>678</sup> *Designation Order*, 8 FCC Rcd at 6911-15.

<sup>679</sup> *Interim Overhead Order*, 8 FCC Rcd at 8360. A closure factor is the ratio of revenue to prospective direct costs. *Id.* at 8359.

which they failed to provide adequate cost support, despite repeated direction from the Bureau that they provide such data. Further, we reject BellSouth's assertion that the interim rate was not just and reasonable. We find that our interim prescription of maximum permitted overhead loading factors was just and reasonable because it was derived from the overhead loading factors assigned to special access services that compete with services provided by interconnectors. We find that assigning to physical collocation service the overhead loading factors of LEC services that face competition from interconnectors is reasonable because these services are comparable to services provided by interconnectors. We made this prescription on the basis of the best surrogate data available subject to a two-way adjustment mechanism. In our view, an interim rate prescription subject to future adjustment is a rate set using the best available data and should not necessarily represent the compensation that ultimately will be received for the service provided. Once a fair and reasonable rate can be determined and a permanent rate is established, the two-way adjustment enables the difference between the interim and the final rates to be refunded to the appropriate party. Thus, the interim rate assures that a fair and reasonable rate will ultimately be established and that no party will be prejudiced.

409. To accept BellSouth's interpretations of these sections of the Communications Act would effectively eviscerate our authority under these provisions by giving the LECs an incentive to withhold data justifying their rates, while preventing this Commission from rejecting the rates because of the insufficient justification. As we stated in the *Interim Overhead Order*, without the authority to prescribe an interim rate once we determine that the LECs' rates are unlawful, we would have been faced with the choice of either removing expanded interconnection service for lack of lawful rates or allowing rates to return to their originally filed rates, thereby discouraging customers from taking expanded interconnection due to the excessive costs.<sup>680</sup> We reaffirm our conclusion that these alternatives would have frustrated the public interest by delaying the benefits of expanded interconnection service. The interim overhead rate prescription was thus necessary to ensure that rate levels were based on a reasonable overhead loading factor pending further investigation and was a proper exercise of our authority under Sections 4(i), 204(a) and 205 of the Act.

410. Accordingly, we deny BellSouth's petition for reconsideration of the *Interim Overhead Order*.

## **V. APPLICATIONS FOR REVIEW OF THE *PHYSICAL COLLOCATION TARIFF SUSPENSION ORDER***

### **A. Background**

411. On July 9, 1993, NYNEX, SWB, and US West filed applications for review of the *Physical Collocation Tariff Suspension Order*. In the *Physical Collocation Tariff*

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<sup>680</sup> *Id.* at 8360.

*Suspension Order*, the Bureau found that the LECs' expanded interconnection tariffs raised significant questions of lawfulness regarding rate levels, rate structures, and terms and conditions that warranted investigation.<sup>681</sup> The order, among other things, partially suspended the LECs' special access expanded interconnection tariffs pursuant to Section 204(a) of the Communications Act, initiated an investigation into the lawfulness of these tariffs, imposed an accounting order, rejected patently unlawful terms and conditions, and ordered certain tariff revisions.<sup>682</sup>

412. The applications for review essentially raise three issues. First, all three LECs contend that the Bureau did not have authority to prescribe interim rates for a new service under Section 204(a).<sup>683</sup> Second, SWB contends that, even if the Bureau had authority to prescribe interim rates, the methodology applied by the Bureau in prescribing interim rates was "arbitrary."<sup>684</sup> Third, US West and NYNEX raise issues regarding collocation in leased central offices: US West contends that the Bureau unlawfully ordered the LECs to offer physical and virtual collocation in leased offices,<sup>685</sup> while NYNEX seeks clarification of the Bureau's requirements for waiver of the obligation to provide collocation in leased offices.<sup>686</sup> We discuss each of these issues in turn. For the reasons discussed below, we deny the applications for review and affirm the actions taken by the Bureau in the *Physical Collocation Tariff Suspension Order*.

## **B. Discussion**

### **1. Authority Under Section 204(a) to Partially Suspend Rates**

413. All three LECs contend that the *Physical Collocation Tariff Suspension Order* exceeds the authority of the Commission under Section 204(a). The LECs argue that the Bureau's "partial suspension" of the LECs' proposed rates for special access expanded interconnection is tantamount to a prescription of rates for a new service, which is not authorized under Section 204(a).<sup>687</sup> They argue that rate prescriptions are only authorized

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<sup>681</sup> *Physical Collocation Tariff Suspension Order*, 8 FCC Rcd at 4591.

<sup>682</sup> *Id.* at 4591, 4606.

<sup>683</sup> NYNEX Application for Review at 3-6; SWB Application for Review at 2-11; US West Application for Review at 3-6.

<sup>684</sup> SWB Application for Review at 11-16.

<sup>685</sup> US West Application for Review at 6-8.

<sup>686</sup> NYNEX Application for Review at 7-8.

<sup>687</sup> NYNEX Application for Review at 3-6; SWB Application for Review at 2-11; US West Application for Review at 3-6.

under Section 205, and the Bureau did not cite that provision as authority for its action or follow the procedural requirements of that section.<sup>688</sup> They further argue that the Bureau's action under Section 204(a) is not supported by legislative history or case authority.<sup>689</sup> They assert that the legislative history indicates that Section 204(a) only permits the Commission to suspend portions of rate changes for existing services, not new services.<sup>690</sup>

414. We find that the authority granted to the Commission in Section 204(a), and specifically invoked by the Bureau in the *Physical Collocation Tariff Suspension Order*, permits partial suspension of rates pending an investigation.<sup>691</sup> Section 204(a)(1) of the Act states in relevant part:

Whenever there is filed with the Commission any new or revised charge, classification, regulation or practice, the Commission may . . . enter upon a hearing concerning the lawfulness thereof; and pending such hearing . . . may suspend the operation of such charge, classification, regulation or practice, in whole or in part but not for longer period than five months beyond the time

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<sup>688</sup> NYNEX Application for Review at 3; SWB Application for Review at 3-4, 10; US West Application for Review at 3, 5-6.

<sup>689</sup> NYNEX Application for Review at 4-6, nn. 8, 10, 11 and 13; SWB Application for Review at 4-11, nn. 9-19; see US West Application for Review at 5, n.14.

<sup>690</sup> NYNEX Application for Review at 5; SWB Application for Review at 6; US West Application for Review at 3.

<sup>691</sup> See Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-166, Memorandum Opinion and Order, 6 FCC Rcd 4776, 4777 (1991) ("*Dark Fiber Order*") (holding that Section 204(a) permits partial suspension of rates pending a tariff investigation). See also *Virtual Collocation Tariff Suspension Order*, 10 FCC Rcd at 1974 (the Bureau exercised its Section 204(a) suspension power to establish interim rates); Bell Atlantic Telephone Companies, Revisions to Tariff F.C.C. No. 1, CC Docket No. 88-136, Memorandum Opinion and Order, 6 FCC Rcd 1436, 1438-39 (1991) (Bureau ordered partial suspension of rates for dark fiber service under Section 204(a)).

SWB acknowledges that the Commission had previously asserted its authority to prescribe interim rates under Section 204(a) when it denied SWB's application for review of a prior Bureau rate prescription under Section 204(a) for dark fiber. SWB notes that it filed for review of the *Dark Fiber Order* with the U.S. Court of Appeals for the D.C. Circuit. SWB Application for Review at 10. Indeed, in *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994), SWB and other LECs challenged a series of FCC orders -- which included the *Dark Fiber Order* -- involving dark fiber service offerings, on the following three grounds: (1) that the FCC lacked common carriage jurisdiction over the dark fiber service offerings; (2) that the FCC exceeded its statutory authority in prescribing interim rates during the period of rate suspension; and (3) that the FCC impermissibly relied on an *ex parte* communication in reaching its decision in an order addressing Section 214. *Id.* at 1479. We note that the court did not pass on the authority of the FCC to prescribe interim rates under Section 204(a). The court decided only the jurisdictional question. With respect to that jurisdictional question, the court found that the Commission provided insufficient support for concluding that petitioners had offered dark fiber service on a common carrier basis. *Id.* at 1484. The court remanded the orders to the Commission for the limited purpose of reviewing our authority to regulate dark fiber service. *Id.*

when it would otherwise go into effect . . . .<sup>692</sup>

415. We find that the plain language of Section 204(a) permits suspension of a charge "in whole or in part"<sup>693</sup> for five months beyond the period when it would otherwise go into effect. A fundamental principle of statutory interpretation holds that when the language of a statute is clear, an examination of legislative history is unwarranted.<sup>694</sup> Moreover, contrary to the LECs' argument, we find nothing in the legislative history to indicate that the Bureau's partial suspension authority is limited to existing services. The statute explicitly states that it applies to "new or revised" charges, and the LECs have not directed us to legislative history or case law interpreting Section 204(a) that contradict our interpretation.

416. Furthermore, we disagree that the Bureau's action was in effect a Section 205(a) prescription. The *Physical Collocation Tariff Suspension Order* simply ordered that the carrier's proposed rates for expanded interconnection be partially suspended, which had the effect of temporarily establishing interim rates based on the remaining charges filed by the carriers. As explained above, this action is consistent with our authority under Section 204(a). Furthermore, we believe the Bureau was fully justified in taking this action because a total suspension would have deprived customers of service during the suspension period, and investigation without a five-month suspension could have subjected customers to excessive rates. We find that the Bureau's action ensured that expanded interconnection would be available, without interruption, at rate levels that better enabled interconnectors to provide economically efficient competition during the first five months of this investigation.<sup>695</sup>

## 2. The Bureau's Methodology for Making Partial Disallowances

417. Separately, SWB contends that, even if the Bureau had authority to prescribe interim rates under Section 204(a), the methodology the Bureau applied was "arbitrary."<sup>696</sup> Specifically, SWB complains that the order fails to justify why the Bureau made reductions to SWB's direct costs for four of its proposed rate elements -- conduit, DC transmission power, DS1 interconnection cross connect and DS3 interconnection cross connect,<sup>697</sup> that, contrary to

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<sup>692</sup> 47 U.S.C. § 204(a)(1).

<sup>693</sup> The language was added by a 1976 amendment of Section 204. Pub. L. No. 94-376, § 2, 90 Stat. 1080 (1976).

<sup>694</sup> *North Dakota v. United States*, 460 U.S. 300, 312 (1983); *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980); *United States v. Oregon*, 366 U.S. 643, 648 (1961); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947).

<sup>695</sup> See *Physical Collocation Tariff Suspension Order*, 8 FCC Rcd at 4599.

<sup>696</sup> SWB Application for Review at 11-16.

<sup>697</sup> *Id.* at 12.

the Bureau's findings, the overhead loading methods used by SWB were sufficiently explained in its filing and reply comments, and the overhead loading factors substituted by the Bureau in its recalculation of SWB's rates were based upon improper use of ARMIS data,<sup>698</sup> and that the manner in which the Bureau adjusted ARMIS data to calculate new overhead loading factors incorrectly exclude all of the land and building investment amounts from its general support facilities costs.<sup>699</sup>

418. We reject SWB's argument that the methodology applied by the Bureau was "arbitrary." Under the new services test, LECs must file detailed cost support that includes engineering studies, time and wage studies, or other cost accounting studies that identify the costs of providing the new service. Notwithstanding these requirements, the LECs did not submit cost data with sufficient detail and explanation to enable the Commission to make a conclusive finding that the rates derived on the basis of those costs were just and reasonable.<sup>700</sup> Absent such information, the Bureau determined that overhead loading factors based on ARMIS data represented the best currently available, verifiable and reasonable surrogate for the upper limits of overhead loading factors for expanded interconnection. Accordingly, we find that the Bureau did not arbitrarily suspend the LECs' overhead loading factors to the extent those factors exceeded those derived from ARMIS-based FDC data for the interim tariff investigation period. Furthermore, we reject SWB's argument that the Bureau incorrectly calculated its direct costs for four of its rate elements and affirm the method applied by the Bureau which we apply in this investigation. We therefore affirm the Bureau's decision in the *Physical Collocation Tariff Suspension Order* to the extent consistent with our current findings in this order.

### 3. Expanded Interconnection in Leased Offices

419. US West contends that the *Physical Collocation Tariff Suspension Order* unlawfully requires US West to secure agreements from parties from whom it rents central office space to allow collocation at those central offices.<sup>701</sup> It asserts that it will face additional burdens, ranging from increased rental rates to guarantee requirements.<sup>702</sup> While US West states that it does not oppose this collocation requirement for future lease agreements, it urges the Commission to reverse that part of the order that applies the requirement to leases that were in effect at the time the *Special Access Expanded*

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<sup>698</sup> *Id.* at 13-14.

<sup>699</sup> *Id.* at 14-16.

<sup>700</sup> *Physical Collocation Tariff Suspension Order*, 8 FCC Rcd at 4597.

<sup>701</sup> US West Application for Review at 6-7.

<sup>702</sup> *Id.*

*Interconnection Order* became effective.<sup>703</sup> NYNEX, on the other hand, seeks clarification of the Bureau's holding regarding the LECs' responsibility to provide expanded interconnection in leased offices.<sup>704</sup> Specifically, NYNEX asks the Commission to clarify -- for offices leased subsequent to the effective date of the *Special Access Expanded Interconnection Order* -- what would constitute "extraordinary circumstances" in order for a LEC to be entitled to a waiver of the collocation requirement in leased offices.<sup>705</sup>

420. Federally tariffed interstate physical collocation is no longer mandatory in light of the June 10, 1994 decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Bell Atlantic v. FCC*.<sup>706</sup> In *Bell Atlantic*, the D.C. Circuit vacated in part the first two of the Commission's expanded interconnection orders on the ground that the Commission lacked authority under the Communications Act of 1934 to require LECs to provide expanded interconnection through physical collocation.<sup>707</sup> The D.C. Circuit remanded the Commission's orders to permit the Commission to consider whether and to what extent to impose virtual collocation requirements in the absence of a physical collocation requirement.<sup>708</sup> Because tariffed interstate physical collocation is no longer mandatory, US West's complaint regarding the requirement that LECs provide physical collocation if all leased central offices is moot. We also find that NYNEX's request for clarification of the requirements for obtaining a waiver of the provision of physical collocation in leased offices is moot. With respect to the provision of virtual collocation in leased offices, we affirm the Bureau's conclusion that "[w]aiver of virtual collocation is not justifiable on the ground that the office is leased by the LEC because virtual collocation does not require permitting third-party access to LEC premises."<sup>709</sup> Requests to waive the provision of virtual collocation in leased offices will be granted on the same basis as requests to waive provision of virtual collocation in owned offices, *i.e.*, only if the LEC has proven that there is insufficient space to provide virtual

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<sup>703</sup> *Id.* at 8 & n.22.

<sup>704</sup> NYNEX Application for Review at 7-8.

<sup>705</sup> *Id.*

<sup>706</sup> 24 F.3d 1441 (D.C. Cir. 1994). Section 251(a)(6) of the Telecommunications Act of 1996 requires incumbent LECs to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements of their premises. 47 U.S.C. § 251(a)(6). Section 251 does not, however, require this service to be tariffed.

<sup>707</sup> *Bell Atlantic*, 24 F.3d at 1447.

<sup>708</sup> *Id.* ICB offerings are particular services that a carrier provides in response to a specific request from a customer under individualized rates, terms, and conditions. Such offerings are not generally available to other prospective customers, although the tariffs containing the specific service offerings and ICB rates are filed with the Commission. ICB offerings are an exception to the standard carrier practice of making a service generally available to prospective customers under uniform rates, terms, and conditions stated in the applicable tariff.

<sup>709</sup> *Physical Collocation Tariff Suspension Order*, 8 FCC Rcd at 4604.

collocation.<sup>710</sup>

## VI. BELL ATLANTIC'S PETITION FOR CLARIFICATION OF THE SUPPLEMENTAL DESIGNATION ORDER

### A. Background

421. In the *Special Access Expanded Interconnection Order*, we prohibited the LECs from pricing, on an individual case basis (ICB), certain connection charge elements, including the labor and material charges for initial preparation of central office space under physical collocation.<sup>711</sup> We stated that time and materials charges for central office construction could reasonably be uniform within each LEC's central office and we therefore required uniform per unit pricing for these elements.<sup>712</sup> On May 31, 1994, the Bureau released a *Supplemental Designation Order and Order to Show Cause*<sup>713</sup> (*Supplemental Designation Order*) to designate for investigation additional issues raised in oppositions to direct cases filed in response to the Bureau's earlier *Physical Collocation Tariff Suspension Order*.<sup>714</sup> These new issues related to certain LECs' use of time and material charges for central office construction for physical collocation. Specifically, several commenters raised concerns that certain LECs' tariffs failed to include specific costs and rates for construction as required by the *Special Access Expanded Interconnection Order*.<sup>715</sup> In the *Supplemental Designation Order*, the Bureau determined that, based on the record, it appeared that certain LECs had misunderstood the Commission's discussion of time and materials charges in the *Special Access Expanded Interconnection Order*. The Bureau explained that these LECs had not included specific time and materials charges in their tariffs, but instead had implied that they would develop rates for construction in response to individual customer requests.<sup>716</sup>

422. In light of the Commission's prohibition against the use of ICB rates for these services, the *Supplemental Designation Order* designated for investigation the issue of whether the LECs' approach to time and materials charges for central office construction is reasonable. The Bureau stated that "[p]ricing access services on an individual case basis . . . represents a departure from normal practice and is usually reserved for unique or unusual common carrier

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<sup>710</sup> *Id.*

<sup>711</sup> *Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7442.

<sup>712</sup> *Id.*

<sup>713</sup> *Supplemental Designation Order*, 9 FCC Rcd 2742.

<sup>714</sup> 8 FCC Rcd at 4589.

<sup>715</sup> *Supplemental Designation Order*, 9 FCC Rcd at 2745.

<sup>716</sup> *Id.*

service offerings for which the carrier does not yet have sufficient experience to develop general rates."<sup>717</sup> The Bureau stated further that "once sufficient knowledge is gained about the costs of service, the Commission requires that the ICB rates be converted to averaged rates applicable to all customers."<sup>718</sup> The Bureau added that ICB rates are "'generally available' if tariffs embodying these rates are filed and are available to all similarly situated customers."<sup>719</sup>

## B. Pleadings

423. On June 30, 1994, Bell Atlantic filed a Petition for Clarification of the Bureau's *Supplemental Designation Order*, in which it argues that the Bureau's discussion of ICB arrangements is inconsistent with long-standing Commission policy because it does not distinguish ICB offerings from common carrier offerings.<sup>720</sup> In support of its argument, Bell Atlantic cites *Southwestern Bell Telephone Co. v. FCC* ("*Dark Fiber*") in which, according to Bell Atlantic, the court concluded that Commission policy distinguishes ICB arrangements from common carrier offerings.<sup>721</sup> Bell Atlantic urges the Commission to vacate the language in the *Supplemental Designation Order* and to clarify this distinction.<sup>722</sup>

424. SWB and US West filed comments in support of Bell Atlantic's position, claiming that the language in the *Supplemental Designation Order* does not accurately characterize the state of the law regarding ICB offerings.<sup>723</sup> According to SWB, the *Designation Order* implies that carrier ICB offerings must be generally available to all similarly-situated customers, whether or not the offering meets the test for common carriage.<sup>724</sup> SWB states that the *Dark Fiber* decision made it clear that an ICB arrangement does not necessarily subject a carrier to Title II regulation and argues that some ICB rates for private service arrangements need not be converted to averaged rates, even after the carrier has gained sufficient knowledge about the costs of the service.<sup>725</sup> SWB also complains of disparate application of the Bureau's ICB policy, arguing that the Commission allows SWB's

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<sup>717</sup> *Id.* at 2744.

<sup>718</sup> *Id.*

<sup>719</sup> *Id.* at 2744 n.35.

<sup>720</sup> Bell Atlantic Petition for Clarification at 2-3.

<sup>721</sup> *Id.* (citing *Southwestern Bell, et al. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994) ("*Dark Fiber*").

<sup>722</sup> *Id.* at 4.

<sup>723</sup> SWB Comment at 2; US West Comment at 1-2.

<sup>724</sup> *Id.* at 3.

<sup>725</sup> *Id.* at 2.